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Can we afford the War Powers Act?

## PRESIDENTIAL HANDCUFFS

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SINCE the Vietnam War, U.S. foreign policy has become a matter of constant and embittered controversy, not merely between the party in office and its opponents, but within parties. No president, however farsighted and decisive, can now conduct an effective foreign policy. Increasing challenges to American interests in Central America and elsewhere, and the War Powers Act and other congressional restraints on the executive branch, have created a dangerous whipsaw which renders our foreign policy erratic and ineffective.

Nicaragua, dominated by Cuba, and apparently determined to emulate the Cuban example of totalitarian government, military aggressiveness, and subservience to the ambitions of the Soviet Union, has embarked upon a policy of militarism—a course that threatens the Nicaraguan people as well as the peace and security of the isthmus. Nicaragua provides a safe haven for Salvadoran terrorists and radio facilities to coordinate their attacks; and it participates in the Soviet-Cuban spy network blanketing Central America and the Caribbean. Nicaragua is training an army far larger than any other in Central America, and threatens peaceful countries such as Costa Rica and Panama. The leaders of both of these countries told the Kissinger Commission they believe that if the Nicaraguan build-up continues, they will be attacked within a few years.

Yet it was the United States—not Nicaragua, not Cuba, not the Soviet Union—that was condemned by the World Court in 1984 over the mining of Nicaraguan harbors. The United States was charged with helping Nicaraguan insurgents mine Nicaragua's harbors, and was found to be violating international law. The regular and flagrant violations of international law by the Soviet Union and its surrogates are well known, yet the Soviet Union, which has never acknowledged the court's jurisdiction, goes un-

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punished. Indeed, the majority of the judges who decided against the United States are from countries that do not accept its jurisdiction.

In dealing with the problem of restraining power without destroying it, the framers of the Constitution made the president the commander in chief of the nation's armed forces. Congress shares in the determination of foreign policy, but the president is responsible for its conduct. Abraham Lincoln conducted the opening stages of the Civil War as an executive act. After the attack on Fort Sumter, he gave Congress 80 days to assemble, but in the interim he called up the militia, blockaded southern ports, raised an army of 300,000 volunteers, and suspended habeas corpus. It is doubtful that he could have gotten most of these actions approved by Congress, although when Congress met, it tacitly approved his *faits accomplis*.

This separation of powers remained in place until the close of the Vietnam War. Ever since the War Powers Act of 1973, the separation of powers has been compromised. The provisions of this act deprive the president of the authority to back his diplomacy with military action short of declared war. Confronting challenges of the sort posed by the Nicaraguan government and the Salvadoran guerrillas, the president has three choices, all bad: (1.) to do nothing; (2.) to ask for a declaration of war; or (3.) to try to find his way through a thicket of legal restraints that inevitably give rise to accusations of illegal conduct. President Reagan rejected the first two options when faced with the situation in Nicaragua; and the whipsaw has caught him on the third. It would catch any president.

**T**O UNDERSTAND WHY, under the prevailing circumstances, any president will be ineffective in the conduct of foreign policy, we must understand how the president's essential freedom of maneuver has been restricted by a series of laws, amendments, and continuing resolutions that transfer responsibility for the conduct of foreign policy, especially its military aspects, to a deliberative body. The constitutionality of many of these measures has yet to be thoroughly tested: it should be.

The War Powers Act, passed over the veto of President Nixon in 1973, was a drastic response to the continuation of the Vietnam War. Presidents Johnson and Nixon had tried to conduct a full-scale war as if it were a police action, an error in which Congress was complicit. The effects of the act, perhaps unforeseeable in 1973, have now become manifest. In a world filled with subversion, terrorism, and shifting geostrategic pressures, Congress must be consulted, "in every possible instance," on the deployment of our military forces. Troops may not be deployed outside the United States without immediate reports to Congress. The president may not, without approval from Congress, keep troops more than 90 days in any area where hostilities are ongoing or imminent. The difficulty in deciding whether hostilities are imminent or ongoing is obvious. Without a specific act of Congress, the president will always be open to the accusation that he is defying the law.

This means that by doing nothing Congress can force

the president to withdraw troops within 90 days; short of declaring war, Congress must pass a bill announcing on what terms U.S. troops will be allowed to remain; in areas of foreign policy and military action where secrecy is often essential, publicity has become mandatory. Military considerations have thus become political issues. The president must now consider, not the efficacy of his actions, but the reaction of Congress to them. By limiting the president's ability to deploy U.S. forces, Congress essentially took upon itself the control of crucial military actions.

**T**HE War Powers Act has been joined by a host of other restrictions on the president's power to act. Various amendments to the Foreign Assistance Act of 1961 have sharply restricted the kinds of security assistance to countries whose human rights records do not meet our standards, even if such assistance is in our national interest, and even if the denial of such assistance leads to the abrogation of all human rights. Had these amendments been on the books in 1942, they would have ruled out all lend-lease assistance to the Soviet Union. For example, it is illegal under the act to provide antipersonnel bombs to the Salvadoran air force. The Salvadorans must buy these weapons elsewhere or use expensive and inappropriate U.S.-made anti-tank rockets against guerrilla fighters, who do not move about the Salvadoran countryside in compact units.

Our room for non-military action is also jeopardized. The Foreign Assistance Act prohibits us from assisting in the development of police activities in other countries. It thus keeps us from helping Costa Rica to strengthen its security forces, which are technically policemen rather than soldiers. Similarly, the act keeps us from assisting with legal reforms in El Salvador.

The Clark Amendment of 1976 was an early milestone in making the covert overt: it forbids the president to provide "assistance of any kind" that would promote, "directly or indirectly," the "capacity of any nation, group, organization, movement, or individual to conduct military or paramilitary operations in Angola" without submitting detailed plans to the Congress. The effect of the Clark Amendment was to give free play to Castro in Angola, who was not similarly restrained by a Cuban legislature. Cuba's ability to send its forces to Africa and anywhere else in the world with impunity is an extension of the Clark Amendment.

The Boland Amendment of 1982 further restricted the president: it specifically forbade him from assisting any group for the purpose of overthrowing the government of Nicaragua. The tangled web of legal and constitutional issues that this has created was revealed in its full confusion in 1983 when the House debated the covert-overt issue and made this topic a major item for newspaper and television reports.

But perhaps most damaging to an effective foreign policy has been Congress's unwillingness to recognize that secrecy can be essential in the conduct of international affairs. This results in an inescapable contradiction. When

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the details of our covert support for the Nicaraguan rebels are the subject of editorials in the newspapers and debated in Congress, we are forced to conduct our foreign policy by oxymoron: we must be either overtly covert or covertly overt. Either position leaves us open to tendentious criticism and to prosecution under international law. The Nicaraguans, while covertly supporting terrorists in neighboring countries, at least have the sense to deny it.

There is an inherent ambiguity in the current Central American situation that Congress and the American people must accept. Is pressure on the Sandinistas designed to move them toward the democratic government which they promised the Organization of American States and their own people in 1979, or to overthrow them? Is it designed to force them to stop supporting the insurrection in El Salvador and elsewhere in Central America, or to overthrow them? How do we pursue the one objective without taking steps that might achieve the other? If we put pressure on the Sandinistas, how do we know that it is enough to change their policy, but not enough to bring them down? The answers are inherently uncertain, but that is not reason not to act. The president cannot conduct foreign policy by oxymoron.

None of this is to argue that Congress should not help determine our foreign policy, or that it should not be consulted and informed on the actions taken by the executive branch. The objectives of our foreign policy must be an expression of our national will. But this requires that Congress provide leadership rather than politically motivated second-guessing, and that foreign policy be decisive, flexible, coherent, and resourceful. The current situation is deficient in each of these regards. There is always the temptation of doubting the president when he undertakes a course of action that is, in the short run, unpopular. But leadership requires looking beyond the next election and pursuing a course that is, in the longer run, in the national interest.

To require, in the absence of a declared war, that the president clear the detailed implementation of foreign policy with Congress denies him a wide range of tools needed for the effective conduct of diplomacy. The result of this policy may well be national suicide, since we in effect say to our enemies that we cannot draw a line and hold it unless they land on our beaches, and that there is consequently almost no limit to how far they can go.

**T**HE RISE of Nazi Germany provides a clear parallel to the rise of the Soviet presence in the Americas. Hitler made himself master of Europe by small increments. At each step, the Western Allies refused to stop him. Hitler cannot be blamed for thinking that he could take Poland without opposition, for nothing in the behavior of Britain and France had suggested that they would draw a line and fight a war to defend it. Rather, whenever he stepped up to the line, Neville Chamberlain, the British prime minister, would erase it and draw a new one. When the Allies finally demanded that Hitler stop, it required World War II to enforce their demand.

The Soviets similarly probe to see where or whether we will draw the line. They have, for example, bit by bit discovered that we will tolerate a major Soviet offensive capability in Cuba, including squadrons of MiGs, a well-equipped Soviet combat brigade, an intelligence network, and a major submarine base. All of this violates the 1962 understanding between John Kennedy and Nikita Khrushchev that ended the missile crisis. The Soviet Union withdrew its offensive weapons and promised an end to Cuban adventurism if the United States would not invade Cuba. The conditions to which the Soviets and the Cubans agreed have been incrementally violated, without U.S. response. Even before the passage of the War Powers Act, our reluctance to proceed militarily against Soviet proxies in our hemisphere has led to their increasing presence. The act exacerbates the problem. If we do not repeal the act and remove the other restrictions on the effective management of foreign policy, we may find the Soviet Union willing and able to wage covert war in Central America or Mexico, at such a level of intensity that the refugee problem in the United States becomes catastrophic.

This is not inevitable. The Soviet Union and its proxies are led by realists in the use of power. Castro responded cautiously to our liberation of Grenada, and the extremist government of Suriname, immediately after the invasion of Grenada expelled its Cuban advisers. Had the administration submitted legislation for the invasion of Grenada, Congress would still be debating it, and while we dithered about what to do in Grenada, the Cubans would have so reinforced their military presence on the island that it would have taken major military action and the loss of many more lives to remove them.

Not the least of the bad legacies of the Vietnam War is the extent to which Lyndon Johnson's compromised attempt to defend the imperfect democracy of South Vietnam against the totalitarianism of North Vietnam has come to be regarded as the model of what happens when the executive is free to implement foreign policy. This catastrophic event has purged the national memory of other examples. Harry S. Truman promptly supported South Korea in 1950. Johnson himself took resolute action, in concert with the Organization of American States, by sending Marines to the Dominican Republic in 1965 to protect democracy. In the two decades since, power has changed hands in the Dominican Republic without violence. Any president should be free to be as resolute as Truman and Johnson were. We have, through the War Powers Act and through the amendments that have followed it, institutionalized Neville Chamberlain as the model for American presidents. If we remember what Chamberlain's policies led to, we may yet decide that it is time to reverse this disastrous trend.

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